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Padideh Ala'i

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THE WTO AND THE ANTI-CORRUPTION MOVEMENT

Padideh Ala'i[†]

This article explores the role of the World Trade Organization ("WTO") in promoting "good governance"¹ while placing the WTO within the larger framework of the ongoing global anti-corruption movement.² Governmental policies aimed at fighting corruption are part of the "good governance" criteria set forth by the World Bank and other donor agencies.³ An important element of good governance is transparency,⁴ which has also been one of the pillars of the multilateral trading system.⁵ This article argues that from the perspective of the post-Cold War international anti-corruption movement,⁶ the WTO is an important in-

[†] Professor of Law, Washington College of Law, American University. The author thanks Lisa Kohl, Meghan Kloth, Navid Sato and Paulo Palugod for their assistance in preparing this article.

¹ World Bank, *Governance and Anti-Corruption*, <http://go.worldbank.org/EBMU3VA0Z0> (last visited Sept. 17, 2008). The term "governance" generally means "traditions and institutions by which authority in a country is exercised for the common good." This definition includes:

(i) the process by which those in authority are selected, monitored and replaced, (ii) the capacity of the government to effectively manage its resources and implement sound policies, and (iii) the respect of citizens and the state for the institutions that govern economic and social interactions among them.

Id. For the purpose of this article, the term "governance" means the "process of decision-making and the process by which decisions are implemented (or not implemented)." United Nations Economic and Social Commission for Asia and the Pacific, *What is Good Governance?*, <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp> (last visited Sept. 16, 2008). According to the United Nations, "good governance" is governance that allows for wide participation and that is: consensus-oriented, accountable, transparent, responsive, effective, efficient, equitable, inclusive and follows the rule of law. *Id.* These characteristics are related and interdependent and each merit detailed study and analysis that is well beyond the scope of this article.

² For a description of the anti-corruption movement, see *infra* Section II; see also Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 *VAND. J. TRANSNAT'L L.* 877 (Oct. 2000) [hereinafter Ala'i, *Geographical Morality*] (tracing the history of the anti-corruption movement from the time of the East India Company to the present and describing the current anti-corruption movement and its distinguishing features from earlier transnational anti-corruption efforts).

³ See World Bank, *Governance Matters 2008*, <http://info.worldbank.org/governance/wgi/index.asp> (last visited Sept. 24, 2008) (listing control of corruption as one of the World Wide Governance Indicators (WGI) along with: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality and rule of law).

⁴ See WILLIAM MOCK, *ON THE CENTRALITY OF INFORMATION LAW: A RATIONAL CHOICE DISCUSSION OF INFORMATION LAW AND TRANSPARENCY*, 17 *J. MARSHALL J. COMPUTER & INFO. L.* 1069, 1082 (1999) (defining transparency as "sharing information or acting in an open manner," or as "a measure of the degree of which information about official activity is made available to an interested party").

⁵ See Padideh Ala'i, *The Multilateral Trading System and Transparency*, in *TRENDS IN WORLD TRADE: ESSAYS IN HONOR OF SYLVIA OSTRY* 105-32 (Alan S. Alexandroff ed., 2007) [hereinafter Ala'i, *Multilateral Trading System and Transparency*]; see also Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 *UCLA J. INT'L L. & FOREIGN AFF.* 1 (1998) [hereinafter China and the WTO]; Hudson N. Janisch, *Administrative Process and the Rule of Law, in CHINA AND THE LONG MARCH TO GLOBAL TRADE: THE ACCESSION OF CHINA TO THE WORLD TRADE ORGANIZATION* 192-93 (Ostry et al. eds., 2002) (arguing that China will need to move from relationship-based trading towards a transparent rules-based system before it may be fully integrated in international trade).

⁶ See Ala'i, *Geographical Morality*, *supra* note 2, for history and development of the post Cold-War anti-corruption movement.

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stitution because it provides a comparatively successful forum for the expression and development of good governance values such as transparency.

Since the creation of the WTO in 1995 the transparency provisions of the WTO Agreements have become increasingly important and central to its mandate.⁷ An example of this trend is the increase in the use of Article X of the General Agreement on Tariffs and Trade ("GATT") 1994 in the context of WTO dispute settlement and the reaction of the panels and the Appellate Body to such increased use.⁸ Starting in 1997, the transparency and due process obligations contained in Article X of GATT 1994 have emerged from obscurity and been applauded as embodying fundamental principles of transparency and due process.⁹ The increased visibility of the WTO's good governance mandate occurs at a time when the anti-corruption movement is losing steam. After more than a decade, reports indicate that direct efforts at combating corruption in the public sector by the World Bank have been largely unsuccessful, particularly in the context of the poorest countries.¹⁰ In addition, efforts to prosecute bribe payers in the developed world are faltering.¹¹ The WTO contributes to the anti-corruption movement by providing a forum where the problems associated with lack of transparency and due process in administration or implementation of measures (such as rules, judicial decisions or administrative rulings) are acknowledged and countries may negotiate for detailed transparency-enhancing criteria in specific areas of trade regulation.

This article is divided into three parts. The first part begins with an assessment of the WTO's role in promoting transparency and good governance since its creation in 1995. This analysis will review the scope and prevalence of the transparency related provisions and review the jurisprudence of Article X of GATT 1994 as developed by panels and the WTO Appellate Body. The second part will review the post-cold war anti-corruption movement and assess the movement's impact since its emergence in 1996. Finally, the WTO's transparency-related activities will be placed within the larger anti-corruption movement and contrasted

⁷ See, e.g., Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

⁸ General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994 or GATT].

⁹ See Appellate Body Report, United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear, 20, WT/DS24/AB/R [hereinafter Appellate Body Report, US – Underwear]; Panel Report, United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear, ¶¶ 7.64–69, WT/DS24/R [hereinafter Panel Report, US – Underwear].

¹⁰ See WORLD BANK, PUBLIC SECTOR REFORM: WHAT WORKS AND WHY? 58–61 (2008), http://site.resources.worldbank.org/EXTPUBSECREP/Resources/psr_eval.pdf [hereinafter IEG Report] (examining Bank support for public sector reform from 1999–2006); see also discussion *infra* Section II for detailed explanation on IEG Report.

¹¹ See Fritz Heimann & Gillian Dell, Progress Report 2008: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 8 (2008), <http://www.transparency-usa.org/documents/OECD2008ProgressReport.pdf> [hereinafter OECD Report] (showing that there has been no significant improvement in combating corruption since the adoption of the OECD convention).

with the direct approach to the corruption problem undertaken by the World Bank and other multilateral institutions.

I. WTO's Transparency and Good Governance Mandate

A. The Scope of the Transparency Provisions of the WTO

The rise of the regulatory or administrative state in the last half of the twentieth century forced the multilateral trading system to focus on the proliferation of non-tariff barriers ("NTBs") as a result of increased regulation. The text of the Uruguay Round Agreements reflects the reality of a regulatory state by emphasizing the importance of transparency and administrative due process in diverse areas such as trade in services,¹² trade-related aspects of intellectual property rights,¹³ sanitary and phytosanitary measures,¹⁴ and technical regulation.¹⁵ These provisions and many others reflect the increased "legalization" of the multilateral trading system and the evolution of the trading system from GATT 1947. Compared to that system, which was exclusively based on reciprocal bargaining and exchange of concessions, the WTO system increasingly focuses on the process of rule-making and administration of rules by Members.

The oldest good governance and transparency obligation of the WTO is contained in Article X of GATT 1994. The language of Article X was not changed with the creation of the WTO and remains unchanged from what was initially proposed by the United States State Department in 1946 as Article 15 of the suggested Charter of the International Trade Organization ("ITO").¹⁶ Subsequently, the language was adopted as Article X of GATT 1947.¹⁷ The language of Article X was influenced by the U.S. Administrative Procedures Act ("APA"),

¹² General Agreement on Trade in Services, Annex 1B of the WTO Agreement, *supra* note 7 [hereinafter GATS]. Specifically, Article III of GATS (Transparency) largely follows the language of Article X and requires publication of all relevant measures including international agreements affecting trade in services. *Id.* art. III(1). In addition, Article III requires that WTO members annually inform the WTO Council for Trade in Services of any changes made to the laws that affect trade in services and the commitments that each member has made on that agreement. *Id.* art. III(3). It also requires all members to "establish one or more enquiry point to provide specific information to other members." *Id.* art. III(4). GATS Article VI (Domestic Regulation) requires members to maintain "judicial, arbitral or administrative tribunals" to review administrative decisions affecting trade in services. *Id.* art. VI(2)(a).

¹³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the WTO Agreement, *supra* note 7 [hereinafter TRIPS]. Article 63 of TRIPS (Transparency) requires publication of all intellectual property related measures and notification to the WTO Council for TRIPS. *Id.* art. 63.1. In addition, Article 63.3 allows WTO members to object to another member's specific judicial and administrative rulings in the area of intellectual property and to request detailed written justification for the ruling. *Id.* art. 63.3.

¹⁴ Agreement on the Application of Sanitary and Phytosanitary Measures, Annex 1A of the WTO Agreement, *supra* note 7 [hereinafter SPS Agreement].

¹⁵ Agreement on Technical Barriers to Trade, Annex 1A of the WTO Agreement, *supra* note 7 [hereinafter TBT Agreement].

¹⁶ Sylvia Ostry, *Convergence and Sovereignty: Policy Scope for Compromise?*, in *COPING WITH GLOBALIZATION* 52, 67 (Aseem Prakash & Jeffrey A. Hart eds., 2000) (noting that there is no significant difference between GATT Article X and the initial State Department drafting).

¹⁷ See Ostry, *supra* note 5, at 3; see also General Agreement on Tariffs and Trade art. X, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

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which was enacted in 1946.¹⁸ Article X:1 requires that “all laws, regulations, judicial rulings, and administrative rulings of general application” (collectively “Measures”) be “published promptly in such manner as to enable governments and traders to become acquainted with them.”¹⁹ Article X:2 prohibits enforcement of measures prior to publication.²⁰ Article X:3 requires all measures be *administered* in a “uniform, impartial and reasonable manner”²¹ and compels Members to establish tribunals or procedures for review of the administrative actions relating to customs matters.²²

In 1947, not a single GATT contracting party expressed an interest in Article X or objected to its inclusion. In fact, a senior Canadian negotiator of the time was quoted as stating that Article X contained no additional substantive requirements and should therefore not be of any concern.²³ Throughout the GATT years (1947-1995) there were other agreements that contained transparency-related provisions but they were not binding on all contracting parties and remained largely silent obligations.²⁴ During the Uruguay Round, these previously negotiated agreements, such as the Anti-Dumping Code, significantly enhanced the transparency and due process provisions.²⁵ Under GATT 1947, Article X was

¹⁸ See 1 WTO, GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 309 (Updated 6th ed. 1995) (noting that Article X was also “partially based on Articles 4 and 6 of the 1923 International Convention Relating to the Simplification of Customs Formalities”); see also Ala’i, *Multilateral Trading System and Transparency*, *supra* note 5, at 105, 108-12 (discussing the history and evolution of the APA and its relationship with Article X of GATT 1947).

¹⁹ GATT, *supra* note 8, art. X:1 (“Laws, regulations, judicial decisions and administrative rulings of general application . . . pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports, or on the transfer or payments therefore, or *affecting* their sale, distribution, transportation . . . or other use shall be *published promptly* in such manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy . . . shall also be *published*.” (emphasis added)).

²⁰ *Id.* art. X:2 (“No measure of general application . . . effecting an advance in a rate of duty . . . or imposing a new or *more* burdensome requirement, restriction or prohibition on imports . . . shall be *enforced* before such measure has been officially *published*.” (emphasis added)).

²¹ *Id.* art. X:3(a) (“Each [Member] shall administer in a *uniform, impartial and reasonable manner* all its law, regulations, decisions and rulings of the kind described in paragraph 1” (emphasis added)).

²² *Id.* art. X:3(b) (“Each [Member] shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose . . . of the prompt review and correction of administrative action relating to custom matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement.” (emphasis added)).

²³ Sylvia Ostry, *Article X and the Concept of Transparency in the GATT/WTO, in CHINA AND THE LONG MARCH TO GLOBAL TRADE: THE ACCESSION OF CHINA TO THE WORLD TRADE ORGANIZATION*, *supra* note 5, at 123 [hereinafter Ostry, *Article X and Transparency*]; see also *China and the WTO*, *supra* note 5, at 4.

²⁴ Furthermore, the GATT did not have a formalized dispute settlement mechanism and operated under the consensus system that did not allow for many disputes. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 214-46 (5th ed. 2008), for a discussion of the GATT system.

²⁵ The Tokyo Round Anti-dumping Code, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT B.I.S.D. (26th Supp.) (1980) [hereinafter Anti-Dumping Code], did not have many of the transparency and due process requirements contained in the Anti-Dumping Agreement in Annex 1A of the WTO Charter, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1A of the WTO Agreement, *supra* note 7 [hereinafter Antidumping Agreement]. The Antidumping Agreement specifically contained additional

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almost never invoked, and when it was raised by the contracting parties before a GATT panel, it was usually dismissed as subsidiary.²⁶

There are many provisions dispersed throughout the WTO agreements that impose transparency-related obligations. In the context of trade in goods, Article X of GATT 1994 was made applicable to the Agreement on Implementation of Article VII of the GATT,²⁷ Agreement on Rules of Origin,²⁸ and Agreement on Safeguards.²⁹ The other Annex 1A Agreements do not specifically reference Article X of GATT 1994, but they do contain extensive transparency and due process provisions. These agreements include the Agreement on Application of Sanitary and Phytosanitary Measures ("SPS Agreement"),³⁰ Agreement on Technical Barriers to Trade ("TBT Agreement"),³¹ Agreement on Implementation of Article VI of the GATT ("Anti-dumping Agreement"),³² Agreement on Subsidies and Countervailing Measures ("SCM Agreement"),³³ and Agreement on Import Licensing Procedures ("Licensing Agreement").³⁴ Generally, many of the Annex 1A Agreements state that in order for rules to be WTO-consistent they must be administered in a manner that is transparent and not unduly restrictive of trade. Many WTO agreements also contain detailed transparency-enhancing notification requirements where Members are required to notify the WTO about changes in rules or adoption of new ones.

The requirements of Article X of GATT 1947 are replicated throughout the Agreement on Trade in Services (GATS).³⁵ Article III of GATS (Transparency) replicates the language of Article X of GATT 1994 and makes it applicable to

provisions on duration and review of anti-dumping duties, *id.* art. 11, public notice, *id.* art. 12, as well as judicial and administrative review, *id.* art. 13.

²⁶ See Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. INT'L ECON. L. 779, 779 (2008) [hereinafter Ala'i, *From the Periphery to the Center*] (discussing the evolution of Article X and its transparency related obligations from relative obscurity before the WTO into a provision of 'fundamental importance' under the WTO, as evidenced by the increased number of cases asserting Article X claims before WTO panels and the appellate body).

²⁷ Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Annex 1A of the WTO Agreement, *supra* note 7, art. 12 [hereinafter Agreement on Customs Valuation] ("Laws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement shall be published in conformity with Article X of GATT 1994").

²⁸ Agreement on Rules of Origin, Annex 1A of the WTO Agreement, *supra* note 7, pmb. ("Recognizing that it is desirable to provide transparency of laws, regulations, and practices regarding rules of origin").

²⁹ Agreement on Safeguards, Annex 1A of the WTO Agreement, *supra* note 7, art. 3.

³⁰ SPS Agreement, *supra* note 14, Annex B.

³¹ TBT Agreement, *supra* note 15.

³² Antidumping Agreement, *supra* note 25, art. 12.

³³ Agreement on Subsidies and Countervailing Measures, Annex 1A of the WTO Agreement, *supra* note 7, art. 22 [hereinafter SCM Agreement].

³⁴ Agreement on Import Licensing Procedures, Annex 1A of the WTO Agreement, *supra* note 7, pmb. [hereinafter Licensing Agreement] (*Convinced* that import licensing, particularly non-automatic import licensing, should be implemented in a transparent and predictable manner . . . *Desiring* to simplify, and bring transparency to, the administrative procedures and practices used in international trade . . .").

³⁵ GATS, *supra* note 12.

trade in services. It requires publication of all relevant measures including all international agreements affecting trade in services.³⁶ In addition, Article III requires that WTO members annually inform the WTO Council on Trade in Services about any changes made to the laws that affect trade in services and the commitments that each member has made on that agreement.³⁷ Article III of GATS also requires WTO members to “establish one or more enquiry points to provide specific information to other members.”³⁸ Article VI of GATS regarding domestic regulation requires members to maintain “judicial, arbitral or administrative tribunals” to review administrative decisions affecting trade in services.³⁹

Similarly, the TRIPS Agreement has extensive transparency requirements including Article 63, which requires publication of all intellectual property measures and notification to the WTO Council for TRIPS.⁴⁰ In addition, Article 63.3 of TRIPS allows WTO members to object to another member’s judicial and administrative rulings in the area of intellectual property and to request detailed written justification for the ruling.⁴¹

The Trade Policy Review Mechanism (“TPRM”)⁴² of the WTO is a transparency related mechanism that dates back to the Montreal Ministerial Meeting in December 1988 when the Negotiating Group on the Functioning of the GATT System (“FOGS”) introduced the TPRM into the agenda of the Uruguay Round.⁴³ The TPRM was intended to improve adherence to the agreed policies and practices of the GATT through greater transparency in domestic implementation.⁴⁴ The TPRM was explicitly not designed to enforce GATT obligations or dispute settlement procedures.⁴⁵ On January 1, 1995, the TPRM became Annex 3 to the WTO Charter with the mandate to perform periodic reviews of the trade policies and practices of all Members. The TPRM objective is to increase adherence by Members to the WTO rules, disciplines and commitments “by achieving greater transparency in, and understanding of, the trade policies and practices of Members.”⁴⁶ Specifically, the TPRM examines the impact of a Member’s trade policies and practices on the multilateral trading system.⁴⁷ In the TPRM Part B the Members recognize the important role that the mechanism can play in promoting “domestic transparency.” The relevant language in the TPRM provides:

³⁶ *Id.* art. III:1.

³⁷ *Id.* art. III:3.

³⁸ *Id.* art. III:4.

³⁹ *Id.* art. VI:2(a).

⁴⁰ TRIPS, *supra* note 13, art. 63.

⁴¹ *Id.* art. 63.3.

⁴² Trade Policy Review Mechanism, Annex 3 of the WTO Agreement, *supra* note 7 [hereinafter TPRM].

⁴³ Negotiating Group on Functioning of the GATT System, *Note by the Secretariat: Meeting of 24-28 October 1988*, ¶ 8, MTN.GNG/NG14/10 (Nov. 14, 1988).

⁴⁴ TPRM, *supra* note 42, ¶¶ A, B.

⁴⁵ *Id.* ¶ A(i).

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.* ¶ A(ii).

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Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral-trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems.⁴⁸

The voluntary language was included because the TPRM under the WTO is "not intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members."⁴⁹ Subsequent internal appraisal of the operation of the TPRM have concluded that "[g]reater attention should be given to transparency in government decision making in trade policy matters"⁵⁰ and that the TPRM "had demonstrated that it had a valuable public-good aspect, particularly in its contribution to transparency"⁵¹ and that it had at times "been a catalyst for Members to reconsider their policies, had served as an input into policy formulation and had helped identify technical assistance needs."⁵² Clearly, there is much more that the TPRM can do to enhance domestic transparency. Such progress is likely to positively impact areas beyond decision making, and particularly in the area of trade given the ever-expansive scope of measures that are considered to be related to trade.

The transparency obligations of the WTO may extend beyond the text of negotiations from the Uruguay Round as additional transparency and good governance provisions are found in Protocols of Accession to the WTO.⁵³ The most noteworthy example is the accession protocol of the People's Republic of China. Examples of China's transparency obligations include: (1) a commitment to enforce only those laws, regulations and other measures that pertain to or affect trade in goods, services, intellectual property and foreign exchange that are pub-

⁴⁸ *Id.* ¶ B.

⁴⁹ *Id.* ¶ B.

⁵⁰ WORLD TRADE ORGANIZATION, ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE, Vol. II, 1388 (Cambridge University Press, 2nd ed. 2007) (citing World Trade Organization, *Appraisal of the Operation of the Trade Policy Review Mechanism*, ¶ 3, WT/MIN(99)/2 (1999) [hereinafter *Appraisal of the Operation of TPRM*]).

⁵¹ *Id.* (citing *Appraisal of the Operation of TPRM*, *supra* note 50, ¶ 4).

⁵² *Id.*

⁵³ The results of the accession negotiations are:

[A]ll brought together in a draft Protocol setting out the terms on which the applicant is to be invited to accede. The [Accession] Protocol is annexed to the Report of the Working Party. The Working Party also annexes a draft Decision for the General Council inviting the applicant to accede on the terms set out in the draft Protocol. The General Council/Ministerial Conference adopts Working Party Reports in accordance with the relevant WTO decision-making procedures. When they adopt the Decision, WTO Members offer terms of accession to the acceding state. When it accepts the Protocol, by signature or otherwise, the acceding state also accepts those terms and becomes a Member of the WTO thirty days after notifying acceptance of the Protocol.

Handbook on Accession to the WTO: Introduction and Summary from the WTO's Accessions Div. (2007), http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/intro_e.htm.

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lished and readily available to other WTO Members, individuals or enterprises;⁵⁴ (2) an obligation to establish or designate an official journal for publication of all such laws and to provide appropriate authorities with a “reasonable period of time for comment” before such measures are implemented;⁵⁵ (3) a commitment that the official journal will be regularly published with copies readily available;⁵⁶ (4) a commitment to establish or designate enquiry points where, upon request, any individual, enterprise or WTO Member shall obtain copies of measures affecting trade;⁵⁷ and (5) an agreement to set up some sort of mechanism whereby individuals, enterprises and other WTO Members can request information and get reliable and accurate information from the Chinese government within a timely manner.⁵⁸

As a result of the transparency provisions enumerated above and other good governance commitments of Members, thousands of laws and regulations have been implemented across the globe and institutions have been set up to make Members comply with such obligations.⁵⁹ The WTO website seems to promote this view when it states that the WTO commitments promote “good government.”⁶⁰

B. The DSM and Good Governance

Throughout the history of GATT (1947-1994), there are only nine adopted GATT 1947 panel decisions involving Article X of GATT 1947. To one extent or

⁵⁴ World Trade Organization, *Accession of the People's Republic of China*, pt. 1, sec. 2(C), para. 1, WT/L/432 (Nov. 23, 2001) [hereinafter *Accession Protocol of the People's Republic of China*].

⁵⁵ *Id.* pt. 1, sec. 2(C), para. 2.

⁵⁶ *Id.*

⁵⁷ *Id.* pt. 1, sec. 2(C), para. 3.

⁵⁸ *Id.*

⁵⁹ As per its requirements in the Accession Protocol, China established the MOFCOM Gazette published by the Ministry of Commerce of the People's Republic of China (“MOFCOM”) to publicize all trade-related laws, regulations, and rules. Ministry of Commerce of the People's Republic of China, <http://english.mofcom.gov.cn/index.shtml>. This website is the only official enquiry point noted in the WTO Transitional Review of China in 2007 whereby the public may comment, review comments from other members of the public, and view the government's responses. *Accession Protocol of the People's Republic of China*, *supra* note 54, pt. 1, sec. 2(C), para. 3; *see also* World Trade Organization, Council for Trade in Goods, *Report of the Council for Trade in Goods on China's Transitional Review*, ¶ 7.34, G/L/844 (Dec. 7, 2007). The WTO Trade Policy Review Body on China listed several other enquiry points in their earlier 2006 review, which do not appear in the 2007 transitional review, one of which was the General Administration of Quality Supervision, Inspection and Quarantine (“AQSIQ”) to monitor the inspection process of cargo imported to China. Trade Policy Review Body, *Report by the Secretariat, People's Republic of China, Revision 38*, WT/TPR/S/161 (June 26, 2006). Pursuant to agreement in the 2008 Strategic Economic Dialogue (SED) talks between the United States and China, the Information Centre Legislative Affairs Office of the State Council P.R. of China, would “publish in advance for public comment, subject to specified exceptions, all trade and economic-related administrative regulations and departmental rules that are proposed for adoption.”; *U.S.-China Economic Dialogue Ends on Successful Note*, June 19, 2008, <http://www.america.gov/st/texttransenglish/2008/June/20080619150342xjsnommis0.7032129.html>; *see. e.g.*, Foreign Trade Law of the People's Republic of China, July 1, 2004, <http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200703/20070304473373.html> (example of publication of trade and economic-related regulation).

⁶⁰ World Trade Organization, *The 10 Benefits of the WTO System*, http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b10_e.htm (last visited Sept. 17, 2008).

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another, the United States has been involved in all of them.⁶¹ The first mention of Article X of GATT 1947 within the context of a trade dispute was in 1984. The initial cases involving transparency claims were all filed by the United States against Japan.⁶² These cases generally reflected the frustration of the United States with what it deemed to be an opaque and secretive system of administrative guidance used by the Japanese government to implement policy in the trade area and to influence actions of private Japanese traders as well as to encourage consumer preferences for domestic products. In all of these cases, the reference to issues of transparency and administration of laws (such as prompt and adequate publication) were viewed by the GATT panels as a subsidiary obligation to the more substantive provisions of the GATT, such as the market access provisions of Articles II and XI:1 and the non-discrimination principles of Article I and III. In many cases, the issue of whether or not a measure was administered in a manner inconsistent with the requirements of Article X was dismissed without discussion.⁶³ Instead it ruled that once a measure is substantively a trade barrier, its manner of administration was irrelevant.⁶⁴ The approach of GATT panel reports towards any type of regulation that could serve as a NTB was to find a measure inconsistent with the GATT whenever it operated as a trade barrier. This perspective is moderated under the WTO Agreements where certain types of regulations, such as certain health and safety regulations, are allowed notwithstanding their ability to act as a NTB.

The WTO panels and the Appellate Body are increasingly aware of the legitimate role of regulation even if it does interfere with trade. The focus has shifted to balancing the needs of free trade against the legitimate non-trade goals of

⁶¹ The United States has been involved in the following GATT Panel Reports: GATT Panel Report, United States – Countervailing Duties on *Non-Rubber Footwear from Brazil*, SCM/94 (Oct. 4, 1989); Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, DS17/R (Oct. 16, 1991) [hereinafter GATT Panel Report, *Canada – Provincial Liquor Boards (US)*]; European Economic Community – Regulation on Imports of Parts and Components, L/6657 (Mar. 20, 1990); Canada – Import Restrictions on Ice Cream and Yoghurt, L/6568 (Sept. 27, 1989) [hereinafter GATT Panel Report, *Canada – Ice Cream and Yoghurt*]; European Economic Community – Restrictions on Imports of Apples – Complaint by the United States, L/6513 (June 9, 1989); European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile, L/6491 (Apr. 18, 1989); Republic of Korea – Restrictions on Imports of Beef – Complaint by the United States, L/6503 (May 24, 1989) [hereinafter GATT Panel Report, *Korea – Beef (US)*]; Japan – Trade in Semi-Conductors, L/6309 (Mar. 24, 1988) [hereinafter GATT Panel Report, *Japan – Semi-Conductors*]; Japan – Restrictions on Imports of Certain Agricultural Products, L/6253 (Nov. 18, 1987) [hereinafter GATT Panel Report, *Japan – Agricultural Products I*]; Panel on Japanese Measures on Imports of Leather, L/5623 (Mar. 2, 1984) [hereinafter GATT Panel Report, *Japan – Leather II (US)*]. The United States was involved in all of these cases: six as complainant, one as respondent, and two as interested third party. Out of the seven cases initiated by the United States, three were against Japan. See GATT Panel Report, *Japan – Semi-Conductors*, *supra*; GATT Panel Report, *Japan – Agricultural Products I*, *supra*; GATT Panel Report, *Japan – Leather II (US)*, *supra*. Two were against Canada. GATT Panel Report, *Canada – Provincial Liquor Boards (US)*, *supra*; GATT Panel Report, *Canada – Ice Cream and Yoghurt*, *supra*. One was against Korea. GATT Panel Report, *Korea – Beef (US)*, *supra*.

⁶² See GATT Panel Report, *Japan – Semi-Conductors*, *supra* note 61; GATT Panel Report, *Japan – Agricultural Products I*, *supra* note 61; GATT Panel Report, *Japan – Leather II (US)*, *supra* note 61.

⁶³ See, e.g., GATT Panel Report, *Japan – Leather II (US)*, *supra* note 61, ¶ 57 (stating that “the Panel found that it was not necessary for it to make a finding on these [subsidiary] matters,” referring to Article X arguments of the United States).

⁶⁴ Ala’i, *From the Periphery to the Center*, *supra* note 26, at 784-87.

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regulation. As a result, there has been increased focus on transparency in administration of rules and ensuring that rules are applied in an open, predictable, and even-handed manner.

Since the creation of the WTO in 1995, there has been a minimum of twenty cases addressing Article X of GATT 1994 claims.⁶⁵ A wide variety of countries at different levels of economic development have invoked Article X of GATT 1994, including: Argentina, Australia, Brazil, Chile, Costa Rica, Ecuador, Guatemala, Honduras, India, Indonesia, Korea, Mexico, Thailand, Turkey and the United States. This diversity demonstrates in turn the growing consensus among Members that the expectations for market access and non-discrimination goals of

⁶⁵ Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R (Feb. 29, 2008); Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (US – Customs Bond Directive)*, WT/DS345/R (Feb. 29, 2008); Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (US – Customs Bond Directive)*, WT/DS345/AB/R (Jul. 16, 2008); Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R (Sept. 21, 2007); Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R (Nov. 13, 2006) [hereinafter Appellate Body Report, *EC – Selected Customs Matters*]; Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R (June 16, 2006) [hereinafter Panel Report, *EC – Selected Customs Matters*]; Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (Mar. 6, 2006); Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005); Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (Apr. 25, 2005); Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R (Nov. 26, 2004) [hereinafter Panel Report, *Dominican Republic – Import and Sale of Cigarettes*]; Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004) [hereinafter Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*]; Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R (Nov. 30, 2006); Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/AB/R (Jan. 16, 2003); Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/R (Sept. 16, 2002); Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R (Aug. 8, 2002); Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (Jul. 24, 2001); Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (Feb. 28, 2001) [hereinafter Panel Report, *US – Hot-Rolled Steel*]; Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (Dec. 22, 2000); Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (Dec. 19, 2000) [hereinafter Panel Report, *Argentina – Hides and Leather*]; Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R (Jan. 29, 1999) [hereinafter Panel Report, *US – DRAMS*]; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R (Feb. 22, 1999); Panel Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/R (Oct. 27, 1998); Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 10, 1998) [hereinafter Appellate Body Report, *US – Shrimp*]; Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998); Appellate Body Report, *European Communities – Measures Affecting Importation of Certain Poultry Products*, WT/DS69/AB/R (July 13, 1998); Panel Report, *European Communities – Measures Affecting Importation of Certain Poultry Products*, WT/DS69/R (Mar. 12, 1998); Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998); Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998) [hereinafter Panel Report, *Japan – Film*]; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III (Mexico))*; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/MEX (Sept. 25, 1997); Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997); Appellate Body Report, *US – Underwear*, *supra* note 9; Panel Report, *US – Underwear*, *supra* note 9.

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the trading system cannot be met without transparency in administration of measures.

In contrast to GATT 1947 panels, the WTO panels and the Appellate Body have held that the provisions of Article X are expressions of values of fundamental importance, i.e., transparency and fundamental due process.⁶⁶ As early as 1997, the WTO Appellate Body stated in *United States – Underwear* that Article X “may be seen to embody a principle of fundamental importance . . . known as the principle of transparency that has obviously due process dimensions.”⁶⁷ In many decisions involving Article X of GATT 1994, the Appellate Body has emphasized that Article X is concerned with “expectations of traders” that operate in the “real world” and that in finding violations of those provisions the Appellate Body or the panels will take into account the individual trader’s perspective.⁶⁸ The Appellate Body has stated that the values of due process and transparency must be paramount when a Member attempts to justify a measure under an exception to the WTO obligations.⁶⁹ In other words, erecting trade barriers or applying domestic regulations in a way that disfavors foreign interests must be done in a transparent and even-handed manner.

Appellate Body and other adopted panel reports have expanded the scope of Article X. Article X:1 has been interpreted so that the term “measures of general application” includes both internal measures and border measures.⁷⁰ As a result, the domestic regulatory framework is brought within the scope of the transparency and due process requirements of the WTO. In addition, a panel has held that “a measure qualifies under Article X:1 as an administrative ruling of general application even if it is addressed to only a specific company or shipment so long as such a ruling establishes or revises principles applicable in future cases.”⁷¹ The term “uniform” in Article X:3(a) has been interpreted to mean that “custom laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner over time and in different places

⁶⁶ See Ala’i, *From the Periphery to the Center*, *supra* note 26, at 800 (arguing that the importance of Article X is evidenced by the member countries’ increased willingness to assert Article X claims).

⁶⁷ See Appellate Body Report, *US – Underwear*, *supra* note 9, at 20.

⁶⁸ See, e.g., Appellate Body Report *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 65, ¶¶ 202-210; see also Panel Report *Argentina – Hides and Leather*, *supra* note 65, ¶ 11.77.

⁶⁹ Appellate Body Report, *US – Shrimp*, *supra* note 65, at 182.

⁷⁰ Article X:1 of GATT, *supra* note 8 (“Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.”).

⁷¹ Panel Report, *Japan – Film*, *supra* note 65, ¶¶ 10.384-388.

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and with respect to the other persons.”⁷² Panels have also held that “access to information” and “flow of information” are essential to meeting the due process requirements of Article X:3(a). The WTO panel in *Argentina – Hides and Leather* also defined the term “reasonable” as relating to question of information and access to information.⁷³ In *Dominican Republic – Import and Sale of Cigarettes* the WTO panel ruled that the administration of the provision of the Selective Consumption Tax was “unreasonable” and inconsistent with Article X:3(a) because it used the “nearest similar product” to determine the tax rate on imported cigarettes while that was not the criteria that had been stated in the regulation.⁷⁴ The panel also ruled that a survey taken by the Dominican Republic’s Central Bank on average prices of cigarettes that was the basis for the tax should have been published as an administrative ruling of general application.⁷⁵

The applicability of the general transparency requirements of Article X to the other Agreements of Annex 1A is not clear. The WTO panels and Appellate Body have found that the Article X and the Import Licensing Agreement can simultaneously apply to a measure.⁷⁶ On the other hand, the panels and the Appellate Body have been reluctant to apply the general language of Article X to the Anti-dumping Agreement and have instead focused their decisions solely on the procedural due process requirements of the Anti-dumping Agreement.⁷⁷ However, the panel or the Appellate Body’s refusal to subject anti-dumping practices of the United States to the general due process requirements of Article X:3(a) has not stopped other Members from continuing to bring such claims.⁷⁸

EC-Selected Customs Matters is the only case to date where the sole legal basis for the dispute was the due process requirements of Article X:3(a). In that case, the United States challenged the EEC system of customs administration in its entirety or “as a whole” for not being administered in a uniform manner as required under Article X:3(a).⁷⁹ The panel in *EC-Selected Customs Matters* criticized the EEC system of customs administration as particularly “complicated and, at times, opaque and confusing,” but concluded that the “as a whole” claim

⁷² Panel Report, *Argentina – Hides and Leather*, *supra* note 65, ¶ 11.83.

⁷³ *Id.* ¶ 11.86.

⁷⁴ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, *supra* note 65, ¶ 8.3(c).

⁷⁵ *Id.* ¶¶ 7.408, 8.3(d).

⁷⁶ *Ala’i, From the Periphery to the Center*, *supra* note 26, at 796 (discussing the differing approaches taken by WTO panels and the Appellate Body).

⁷⁷ *See, e.g.*, Panel Report, *US – DRAMS*, *supra* note 65, ¶¶ 4.542–544.

⁷⁸ *Id.* ¶ 4.461 (Korea arguing that “[t]he transparency and uniformity obligations of Article X apply to the WTO Agreements, including the AD Agreement.”); Panel Report, *US – Hot-Rolled Steel*, *supra* note 65, ¶ 7.263 (“Japan submits that Article X of GATT 1994 goes beyond the elements of due process established in the AD Agreement and is in essence a comparative provision that ensures that certain parties are not afforded less due process rights than others.”).

⁷⁹ Panel Report, *EC – Selected Customs Matters*, *supra* note 65, ¶ 4.473 (summarizing that the “United States is arguing that the EC’s system of customs law administration as a whole does not result in the uniform administration that Article X:3(a) requires.”).

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was outside the scope of the panel's terms of reference and could therefore not be decided.⁸⁰

The Appellate Body, on the other hand, held that the EEC's system of customs administration could be challenged "as a whole or overall" under Article X:3(a) and that such a claim was within the scope of the panel's term of reference. On appeal, however, the Appellate Body stated that it did not have enough facts on the issue to decide the "as a whole" claim.⁸¹ As important is the Appellate Body language in the report that destroys the substantive/administrative distinction that had long be used by panels to limit the scope of Article X to only the administration of a measure. The Appellate Body in *EC-Selected Customs Matters* held that the substance of a measure can be challenged so long as it necessarily leads to lack of uniform, impartial or reasonable administration and in violation of Article X:3(a).⁸² By eroding the administrative-substantive distinction that had been used to limit the scope of Article X:3 of GATT 1994, the Appellate Body has not only sanctioned "as a whole" claims but also opened the door to future cases challenging substance of laws under Article X:3 of GATT 1994.

Expansive interpretations of Article X obligations by the Appellate Body have not necessarily resulted in finding of Article X violations. In fact, the culture of the WTO dispute settlement panels and the Appellate Body is to "avoid making controversial decisions, while incrementally developing the jurisprudence so that future panels and the Appellate Body can accommodate the expansion of the [trade] mandate into areas that go beyond GATT's traditional sphere of securing or promoting trade liberalization, and into promoting good governance" within Member states.⁸³ In *EC-Selected Customs Matters* the Appellate Body did find that the EC's system of customs administration could have been challenged "as a whole," but in the end the ultimate finding of inconsistency with Article X of GATT 1994 requirements was very narrow, concentrating on the actual non-uniform administration of customs as it applies to Liquid Crystal Display (LCD) units.⁸⁴ It is the modus operandi of the WTO panels and particularly the Appellate Body to interpret the provisions of the WTO Agreements broadly so that

⁸⁰ *Id.* ¶ 7.191. The panel further stated, "[w]e can imagine that the difficulties we encountered in our efforts to understand the EC's system of customs administration would be multiplied for traders in general and small traders in particular who are trying to import into the European Communities." *Id.*

⁸¹ Appellate Body Report, *EC-Selected Customs Matters*, *supra* note 65, ¶ 285 (stating that, "it appears to us that these general observations of the Panel do not constitute a sufficient foundation of factual findings or undisputed facts upon which we can rely for completing the analysis.").

⁸² *Id.* ¶ 201.

⁸³ Ala'i, *From the Periphery to the Center*, *supra* note 26, at 800-01; *see also* Debra P. Steger, *The Culture of the WTO: Why It Needs to Change*, 10 J. INT'L ECON. L. 483, 485-86 (2007). As Professor Steger writes:

The mandate and purpose of the WTO is no longer clear. The mandate of the GATT system was continuing the process of trade liberalization The preamble to the GATT 1947 reflected these goals. The preamble of the WTO Agreement is broader – it includes the goals of environmental sustainability and development. . . but they have not become part of the accepted theology or culture of the WTO as perceived by its members. So, there is a difference between what the preamble of the WTO says the purpose of the organization is and what its members perceive it to be. *Id.*

⁸⁴ Panel Report, *EC – Selected Customs Matters*, *supra* note 65, ¶ 8.1(b)(v).

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they can maintain great flexibility in interpretation in future cases. At the same time, however, such broad interpretations are applied in a very conservative fashion, as was done in the case of *EC-Selected Customs Matters*. This incremental approach allows the Appellate Body to set the ground work for future decisions enforcing values of good governance without getting the push back that may happen when the rhetoric of anti-corruption is used. The incremental approach of the Appellate Body and panels allows the WTO to continue to require reform in areas of governance, including enhanced transparency, without undermining the legitimacy of the multilateral trading system.

II. The Post-Cold War Anti-Corruption Movement (1996-present)

A. The Scope of the Movement

By 1995, a transnational anti-corruption movement was emerging based on the premise that corruption was a major impediment to the success of market economics.⁸⁵ The movement focused on the detrimental economic (as opposed to social or moral) effects of corruption in the context of development. The universal and objective rules of the market led the movement to categorically reject the cultural relativist approach to corruption.⁸⁶ One reason for the growth of interest in the problem of corruption in the mid-1990s was that economic globalization and the application of free market reforms had also increased the opportunities for corruption.⁸⁷ The failure of free market reforms to reduce the gap between the rich North and the poor South was blamed on corruption as developed country government officials and international financial institutions (“IFIs”)⁸⁸ blamed corruption for “sabotaging” market oriented policies and programs that aimed to reduce poverty.⁸⁹

⁸⁵ See generally Ala'i, *Geographical Morality*, *supra* note 2.

⁸⁶ See ROBERT KLITGAARD, *CONTROLLING CORRUPTION* 64 (1988) (rejecting the notion that corruption should be geographically relative because, “the majority of people in nearly all cultures understand that most types of corruption . . . are neither lawful nor customary”).

⁸⁷ See Susan Hawley, *The Corner House*, *Exporting Corruption: Privatisation, Multinationals and Bribery* (2000), available at <http://www.thecornerhouse.org.uk/pdf/briefing/19bribe.pdf> (arguing that IFIs are responsible for increases of corruption in developing countries through their own policies, of deregulation, privatization and structural adjustment with civil service reform and economic liberalization); see also Someshwar Singh, *Privitization and 'Reforms' Spread Corruption*, *THIRD WORLD NETWORK* (July 5, 2000), available at <http://www.twinside.org.sg/title/corruption.htm> (reiterating Hawley's view that IFIs create opportunities for corruption through their lending policies despite the emphasis on anti-poverty and good governance).

⁸⁸ The IFIs include: The World Bank, the International Monetary Fund (IMF) and the regional development banks, including, the Asian Development Bank (ADB), the Inter-American Development Bank (IDB), the African Development Bank (AFDB) and the European Bank for Reconstruction and Development (EBRD) (collectively referred to as the international financial institutions (IFIs)).

⁸⁹ See Jon Jeter, *Rich, Poor Further apart as Earth Summit Nears*, *WASH. POST*, Aug. 25, 2002, available at <http://www.commondreams.org/headlines02/0825-02.htm> (citing western government officials who blame lack of development on corruption and mismanagement).

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The year 1996 marked a stark shift in the approach of the IFIs⁹⁰ to the problem of corruption.⁹¹ That year, the IFIs “reinterpreted” corruption as an impediment to economic and social development.⁹² Prior to 1996, corruption was viewed as a political issue that was outside the economic mandate of the IFIs. The shift in the rhetoric of corruption from political to economic was not limited to the IFIs, and, in fact, became a distinguishing feature of the post-Cold War international anti-corruption movement.⁹³ The reason for this re-packaging of corruption as an economic issue was that the end of the Cold War led to a global shift to “Western-style” democracy and economic policy and trade had for the first time priority over military and strategic concerns.⁹⁴ Also in 1996, the IMF issued a declaration entitled “Partnership for Sustainable Growth” which included “promoting good governance in all its aspects” and “tackling of corruption” as essential components of development.⁹⁵ By 2001, combating and controlling corruption and promoting good governance had become central to the work of the IFIs.⁹⁶

⁹⁰ This section only discusses the activities of the World Bank but other regional development banks have also had extensive anti-corruption initiatives over the past decade.

⁹¹ See SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSE, CONSEQUENCES AND REFORM 177 (1999) (“The end of the Cold War has changed the balance of forces and removed any compelling need to support corrupt regimes for national security reasons.”).

⁹² The re-interpretation of corruption as an impediment to economic development was particularly useful for the IFIs, which are prohibited under their respective Articles of Agreement from taking into account “non-economic” considerations and from interfering in the “political affairs” of any member. See James D. Wolfensohn, President of the World Bank, Speech at the Farewell Dinner to Ibrahim F.I. Shihata: Transcript of Proceedings of the Formal Liber Amicorum Presentation Ceremony (Sept. 2001) (on file with author) (explaining that corruption could not be mentioned in connection with the bank because it was political but that by “redefining” and “reinterpreting” corruption to pertain to the economy and social issues, the Bank could now deal with the issue).

⁹³ See Ala'i, *Geographical Morality*, *supra* note 2, at 904-09 (discussing the economic focus of the current anti-corruption discourse which include an emphasis on empirical data which highlighted the costs of corruption).

⁹⁴ See Michael A. Almond & Scott D. Syfert, Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New *Global Economy*, 22 N.C. J. INT'L & COM. REG. 389, 399 (1997) (citing the shift to Western-style democracy and market economies as a cause of the increased priority placed on international economic policy).

⁹⁵ Int'l Monetary Fund [IMF], *Partnership for Sustainable Global Growth Interim Committee Declaration*, at 3 (Sept. 29, 1996), available at <http://www.imf.org/external/np/exr/dec.pdf>. In 2000, the IMF issued substantially the same declaration jointly with the World Bank. Compare *id.*, with IMF & World Bank, *An Enhanced Partnership for Sustainable Growth and Poverty Reduction* (Sept. 5, 2000), available at <http://www.imf.org/external/np/omd/2000/part.htm> (listing good governance and freedom from corruption as guiding principles).

⁹⁶ In addition to the actions taken by the IMF and World Bank to fight corruption, a number of regional development banks also enacted programs to combat corruption. For example, in 2001 the Asian Development Bank (ADB) began working with OECD to run the “Anti-Corruption Action Plan for Asia and the Pacific.” ADB/OECD Anti-Corruption Initiative, Anti-Corruption Action Plan for Asia-Pacific (2001), available at <http://www.oecd.org/dataoecd/38/24/35021642.pdf>. The African Development Bank lists both governance and anti-corruption as topics to be addressed by the bank and approved “Good Governance and Policy Implementation Guidelines” in both 1999 and 2001. Afr. Dev. Bank, *Bank Group Policy on Good Governance* (Jul. 1999), available at <http://www.afdb.org/pls/portal/url/ITEM/F56CEE92AAC6A37E030A8C0668C4E3F.pdf>; Afr. Dev. Bank, *Operational Policy for Bank Group Policy on Good Governance* (Mar. 2001), available at <http://www.afdb.org/pls/portal/url/ITEM/16CC941BA21032D6E040C00A0C3D5D84.pdf>.

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Over time, the World Bank's anti-corruption work was subsumed under its "good governance" agenda as "controlling corruption" and became *one* of the six factors the World Bank uses in order to measure a borrowing countries level of good governance.⁹⁷ A prominent example of the IFI's early attempt to combat corruption was the 1997 suspension of \$210 million in aid by the IMF to Kenya due to "poor governance" and excessive corruption.⁹⁸ The IMF and the World Bank conditioned the resumption of aid on the passage of anti-corruption legislation that, among other things, mandated the creation of the Kenya Anti-Corruption Authority.⁹⁹ In 2001, Kenya was required to pass additional governance legislation and codes of ethics and strengthen the legal status of the Anti-Corruption Police Unit. It is clear, however, that such suspension of aid did not reduce corruption. Kenya continues to be ranked as among the most corrupt states in the world as the IFIs have continued to express concern about the prevalence of corruption in Kenya.¹⁰⁰

Early in this century the anti-corruption emphasis of the World Bank became particularly controversial as World Bank President Paul Wolfowitz withheld funding to India, Kenya, Chad, Bangladesh, Argentina, and the Congo.¹⁰¹ By 2006, the World Bank's approach to combating corruption and promoting good governance was raising concerns that the World Bank was now "pursuing anti-corruption measures at the expense of delivering essential funds to the poorest people."¹⁰² The current World Bank President, Robert Zoellick (formerly the United States senior trade negotiator), has been less aggressive than Wolfowitz in

⁹⁷ The World Bank Worldwide Governance Research Indicator Reports evaluate six factors: (1) voice and accountability; (2) political stability and absence of violence; (3) government effectiveness; (4) regulatory quality; (5) rule of law; and (6) control of corruption. See Daniel Kaufmann et al., *Governance Matters VII: Aggregate and Individual Governance Indicators, 1996-2007* (World Bank, Policy Research Working Paper No. 4654, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148386. In addition, the World Bank formed the "World Bank Governance Group" to develop programs promoting good governance and to oversee their implementation.

⁹⁸ See Thomas Omestad, *Bye-Bye to Bribes: The Industrial World Takes Aim at Official Corruption*, *US NEWS & WORLD REP.*, Dec. 22, 1997.

⁹⁹ See Letter of Intent by the Gov't of Kenya to the IMF and the attached Memorandum of Econ. & Fin. Policies of the Gov't of Kenya, 2000-03 (July 10, 2000), <http://www.imf.org/external/np/loi/2000/ken/01/index.htm>; IMF Sets Tough New Conditions for Aid Deal, *DAILY NATION* (Kenya), Aug. 2, 2000 (highlighting the requirements of the IMF, including enacting an anti-corruption and economic crimes bill).

¹⁰⁰ See TRANSPARENCY INT'L, *CORRUPTION PERCEPTIONS INDEX 2008*, <http://www.transparency.org/content/download/36589/575262> [hereinafter CPI 2008] (ranking Kenya as the 147th most corrupt country out of 180 countries).

¹⁰¹ See Sebastian Mallaby, *Wolfowitz's Corruption Agenda*, *WASH. POST*, Feb. 2, 2006, at A21 (providing examples of Wolfowitz's approach to corruption, such as the withholding of millions of dollars for health projects to India).

¹⁰² See Angela Balakrishnan, *Poor Countries Suffering From Aid Chaos*, *GUARDIAN* (London), Sept. 22, 2006, at 30 (expressing the United Nations Conference of Trade and Development's concerns about Wolfowitz's approach); see also Steven R. Weisman, *World Bank's New Chief Will Also Focus on Corruption*, *INT'L HERALD TRIB.*, June 25, 2007 (stating that while Wolfowitz was accused of prioritizing corruption over poverty, the new President intends to continue with the anti-corruption agenda, but not at the expense of the poorest people in the poorest countries).

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cutting funds for countries as part of its anti-corruption initiatives but maintains that he is still pressing ahead with an anti-corruption agenda.¹⁰³

Other significant legal accomplishments of the post Cold War anti-corruption movement have included the ratification of the *Inter-American Convention Against Corruption (OAS Convention)* (1996),¹⁰⁴ the *Organization for Economic Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)* (1997),¹⁰⁵ and the *United Nations Convention Against Corruption (UN Anti-Corruption Convention)* (2003).¹⁰⁶ In addition, in 1998 the Council of Europe established the Group of States against Corruption (GRECO)¹⁰⁷ and adopted three legal instruments; *Criminal Law Convention on Corruption*,¹⁰⁸ *Civil Law Convention on Corruption*,¹⁰⁹ and *Recommendation on Codes of Conduct of Public Officials*.¹¹⁰

Governments, international civil society, business groups and corporations (non-state actors) have also joined the anti-corruption bandwagon. The most significant player has been Transparency International (TI). TI was established in 1993 and has been instrumental in creating the anti-corruption movement. TI's founders were former World Bank employees who had seen the detrimental impact of corruption on economic development. TI proceeded to build a global coalition to combat corruption at both national and international levels and its primary focus has been to mobilize people and expertise behind anti-corruption initiatives at country levels and to interface between governments, businesses and civil society for effective governance.¹¹¹ TI's most influential publication is its

¹⁰³ Weisman, *supra* note 102; see also Bretton Woods Project, *Zoellick and Corruption: A New Approach?*, Feb. 1, 2008, <http://www.brettonwoodsproject.org/art-559952> (describing that Zoellick has a different approach than his predecessor in fighting corruption).

¹⁰⁴ Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter OAS Convention].

¹⁰⁵ Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Convention].

¹⁰⁶ United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/58/422 (Oct. 31, 2003).

¹⁰⁷ See *Agreement Establishing The Group of States Against Corruption-GRECO*, Comm. of Ministers, 102nd Sess., Res. (98) 7 (May 6, 1998), available at <http://www.usdoj.gov/criminal/fraud/fcpa/E2198.htm>. GRECO was initially established by 17 states and has since grown to include 46 states. GRECO functions as a monitoring mechanism that aims to improve the capacity of its members to fight corruption by following up on their activities through a process of mutual evaluation and peer pressure.

¹⁰⁸ Council of Europe Criminal Law Convention on Corruption, Jan. 27, 1999, Europ. T.S. No. 173, Jan. 27, 1999, 38 I.L.M. 505, available at http://www.ohr.int/ohr-dept/afd/int-ref-ef/coe-crim-lcc/default.asp?content_id=5490.

¹⁰⁹ Council of Europe Civil Law Convention on Corruption, E.T.S. No. 174, Nov. 4, 1999, available at <http://conventions.coe.int/treaty/en/treaties/html/174.htm>.

¹¹⁰ Council of Europe, *Recommendation No. R (2000) 10 of the Comm. of Ministers to Member States on Codes of Conduct for Public Officials*, 106th Sess. (May 11, 2000), available at [www.coe.int/t/dg1/greco/documents/Rec\(2000\)10_EN.pdf](http://www.coe.int/t/dg1/greco/documents/Rec(2000)10_EN.pdf).

¹¹¹ See TRANSPARENCY INT'L, About Transparency International, http://www.transparency.org/about_us (last visited Sept. 24, 2008).

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Annual Corruption Perception Index (CPI).¹¹² A low CPI ranking can potentially affect both foreign aid and foreign investment in a developing country.¹¹³ Another example is the International Chamber of Commerce (ICC), a world business organization with national associations in more than 130 countries which has been an active participant in the anti-corruption movement. The ICC focuses on “extortion” of bribes by “foreign public officials” and advocates the inclusion of corruption on the list of non-tariff barriers that are prohibited by WTO rules. The ICC Commission on Anti-Corruption has issued a number of advisory documents and most recently published “The Business Case Against Corruption.”¹¹⁴

B. The Progress Report of the Anti-Corruption Movement

In 2008, the IEG Report was issued reviewing the World Bank activities in the area of Public Sector Reform (PSR) over the past decade. As part of that review, the World Bank Independent Evaluation Group (IEG) also looked at the Bank’s anti-corruption activities which have been a component of PSR.¹¹⁵ The IEG Report states that since 1999 the World Bank has explicitly identified Anti-Corruption and Transparency (ACT) reform as part of its PSR programs.¹¹⁶ It also states that from the late 1990s until 2006 the ACT component of World Bank PSR programs increased from 9% of the total project cost to 38% of total project cost.¹¹⁷ This increase was due to emphasis on ACT conditions in policy reform projects.¹¹⁸ The Report concludes that the increase in the ACT component did *not* reduce corruption in the borrowing country,¹¹⁹ and this is particularly true among the poorest countries.¹²⁰ The IEG Report bases its conclusion on the comparison of corruption incidences between the PSR recipient countries and non-PSR recipient countries and states that the finding that there was “small or zero difference” implied “no significant improvement.”¹²¹ Notwithstanding the overall negative conclusion, the IEG Report concludes that the most successful

¹¹² See CPI 2008, *supra* note 100, at 13 (explaining that the CPI 2007 ranks countries based on the degree to which corruption is perceived to exist among public officials by drawing on polls and surveys from independent institutions).

¹¹³ See *id.* at 16 (noting that the CPI 2008 is widely used by scholars, analysts and governments in assessing aid).

¹¹⁴ INT’L CHAMBER OF COMMERCE ET AL., CLEAN BUSINESS IS GOOD BUSINESS (Jul. 15, 2008), http://www.iccwbo.org/uploadedFiles/The%20Business%20Case%20Against%20Corruption_19June08.pdf (noting that the cost of corruption equals more than 5% of global GDP (US \$2.6 trillion)).

¹¹⁵ IEG Report, *supra* note 10.

¹¹⁶ *Id.* at 30.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (stating that identifiable ACT components increased from 1.7 to 15.1 projects per year between 2000 and 2006).

¹¹⁹ IEG Report, *supra* note 10, at 60.

¹²⁰ *Id.* The Report discusses that International Development Association (IDA) countries that borrowed for PSR did little better than the IDA countries that did not borrow. *Id.* The Report further claims that the difference in improvement between IDA and International Bank for Reconstruction and Development (IBRD) countries is the largest theme in the evaluation. *Id.*

¹²¹ *Id.* (noting that because the results are based on rankings, the numbers will inherently change a little even if nothing changes in the country’s performance).

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methods for combating or controlling public sector corruption are indirect transparency related requirements, such as publication requirements and freedom of information laws.¹²²

The IEG Report distinguishes between (a) grand corruption (state capture) and (b) petty corruption (bureaucratic).¹²³ Furthermore, it distinguishes between direct and indirect approaches to corruption within each of the two categories. The DIRECT means include anti-corruption commissions, public official's disclosure of assets and the investigation and prosecution of sudden changes in government officials' financial statuses. The INDIRECT means include publication and clarification of laws, freedom and access to information and other transparency-related measures. The IEG Report finds that grand corruption or state capture has been difficult to combat through either direct or indirect reforms. The Report does state, however, that the indirect means to combat bureaucratic corruption have been effective and that such progress could in the end also help with the problem of grand corruption or state capture.¹²⁴

In 2008, Transparency International (TI) issued the 2007 Progress Report (OECD Progress Report) on the OECD Convention that criminalized payment of bribes to foreign public officials.¹²⁵ The Report finds that although all the signatories have laws on the books that criminalize paying of bribes to foreign officials there has been very limited prosecution, if any, in many of the signatory nations. The OECD Progress Report states that the system is facing a "stalemate" between those who have enforced the Convention and those who have not and there is a growing role for India and China who are not bound by such a Convention. The Report warns that "unless the laggards start enforcement without further delay, there is danger of backsliding by those that are now enforcing." The present stalemate is unsustainable; support for the Convention must be re-energized or it will falter."¹²⁶ The IEG Report concludes that transparency related measures aimed at targeting bureaucratic corruption have been the most effective way of combating corruption because they break the "culture of secrecy" that "pervades the government functioning and empower[s] people to demand public accountability."¹²⁷

¹²² *Id.* at 62 (emphasizing that support for these measures has been the World Bank's most important contribution to furthering the anti-corruption effort).

¹²³ *Id.* at 58. Examples of grand corruption include: corrupt awards of big contracts; embezzlement of public funds; and kickbacks from international corporations and privatization to insiders at bargain prices. *Id.* at 59 tbl. 5.4. Examples of petty corruption include: bribery; skimming of paychecks; nepotism in appointments; selective enforcement of taxes and the use of public facilities for private paying clients. *Id.*

¹²⁴ *Id.* at 63 (noting that direct measures rarely succeed because they often lack the important support of political elites and the judicial system and reduction of bureaucratic corruption could move the broader political discourse toward opposing grand corruption).

¹²⁵ See OECD Report, *supra* note 11.

¹²⁶ *Id.* at 8.

¹²⁷ IEG Report, *supra* note 10, at 64.

III. Conclusion

The failure of direct efforts to combat corruption shows that for the battle against corruption to succeed there is a need to create a culture that respects transparency and due process. The WTO, more than any other institution, is capable of promoting the culture of transparency and due process. The incremental manner in which the WTO panels and Appellate Body address the lack of transparency and fundamental due process is more likely to reduce opportunities for corrupt acts than setting up an anti-corruption agency as the World Bank has done in Kenya.

It is the culture of secrecy and lack of information or access to information by a population that allows corruption to take hold and increase. The WTO rules prohibit secrecy and value transparency. The WTO, by providing a forum for a discussion of such issues, allows Members to acknowledge certain core values of good governance that are diametrically opposed to the culture of secrecy.

The problem of corruption has existed from the beginning of time and the WTO can neither solve nor eradicate it. However, the WTO can and does play an important role in promoting transparency and good governance. Over the past few years, the potential of the WTO to enhance values that effectively curb corruption, such as transparency, has increased while, at the same time, other efforts to combat corruption have failed or are likely to fail. Additionally, the rhetoric of anti-corruption has lost some appeal given the actions of the World Bank and others. It is advisable for the WTO to refrain from directly addressing the problem of corruption. The WTO can be most effective in combating corruption indirectly through its many provisions that mandate transparency and due process in the administration of all types of regulation.